KOREA DEVELOPMENT CORP.

v.

GOVERNMENT OF MALAYSIA & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[ORIGINATING SUMMONS NO. C 178 OF 1984]
4 JANUARY 1985

CIVIL PROCEDURE: *Withholding tax under s. 107A Income Tax Act - Application to High Court by tax payer - Whether proper - Whether appeal ought not to be made to Special Commissioners of Income Tax - Jurisdiction of Special Commissioners under s. 99 - Whether Originating Summons properly brought.*

The plaintiffs applied to the High Court by Originating Summons to determine the question if the sum of RM1,006,497.06 received by them from the Government of Malaysia as an out-of-Court settlement of a civil suit between the parties was subject to withholding tax under s. 107A of the Income Tax Act 1967. The defendants, the Government of Malaysia and the Director General of Inland Revenue, applied to strike out the Originating Summons on the ground, *inter alia*, that the plaintiffs ought to have exhausted the remedies within the statute by appealing to the Special Commissioners of Income Tax. It was contended for the defendants that the obligation to withhold tax under s. 107A was an advance assessment under the Act which gave the Special Commissioners jurisdiction to hear the case.

Held:

[1] The withholding of tax under s. 107A is not an advance assessment under the Act.

[2] The Special Commissioners do not have jurisdiction to entertain any appeal or complaint in respect of matters or questions that arise from or in respect of the collection and recovery of tax.

[Defendants' application dismissed with costs.]

Cases referred to:
Hubbuck & Sons v. Wilkinson, Heywood & Clark [1899] 1 QB 86
Attorney-General of Duchy of Lancaster v. London & N.W. Railway Co. [1892] 3 Ch 274
Russian Commercial & Industrial Bank v. British Bank for Foreign Trade [1921] 2 AC 438
Re Barnato [1949] Ch 258
Thorne Rural District Council v. Bunting [1972] Ch 470

Legislation referred to:
Income Tax Act 1967, ss. 92, 93, 98, 99(1), 100(4), 101(5), 107A
Rules of the High Court 1980, O. 15 r. 6
Rules of Supreme Court 1883 [UK], O. 25 r. 5

Other source referred to:
The Supreme Court Practice (1979) Vol. I 15/6/1

For the plaintiffs - C.V. Das; M/s. Shook Lin & Bok
For the defendants - Suriyadi Halim Omar; SFC

JUDGMENT

VC George J:

It is not disputed that the plaintiffs, Korea Development Corporation were and are in the context of Malaysia a non-resident contractor within the meaning of s. 107A(5) of the Income Tax Act 1967. In 1972 the plaintiffs as a foreign company and registered as such pursuant to the Companies Act 1965, entered into a contract with the Government of Malaysia to undertake and complete for the Drainage and Irrigation Department of the Government certain civil engineering works known as the Besut Agricultural Development Project.

It was in respect of a cause of action that was alleged to have arisen from that contract that the plaintiffs caused a writ to issue against the Government claiming *inter alia* damages alleged to have been suffered by the plaintiffs. However the Court proceedings were stayed and the dispute was referred to arbitration and a settlement of the plaintiffs' claim was arrived at when the plaintiffs by their solicitors' letter of 22 March 1984 accepted the Government's offer of RM1,006,497.06 "in full and final settlement of their claims", the amount to be paid within 2 months of that date which was duly effected when payment was made on or about 16 May 1984 to the plaintiffs through their solicitors.

A few days later, on 21 May 1984 a Senior Federal Counsel from the Attorney General's chambers acting on behalf of the Government contacted the solicitor having the conduct of the matter for the plaintiffs by telephone and made in effect a request that the plaintiffs' solicitors return to the Government 20% of the said amount paid in settlement of the plaintiffs' claims. The Senior Federal Counsel in his letter of 21 May 1984 written on behalf of the Attorney General confirmed the telephone conversation and stated that the deduction was "necessary pursuant to s. 107A of the Income Tax Act". The plaintiffs themselves received a letter from the Attorney General's Office stating that the need to make the deduction was "mandatory". This was later followed by a letter dated 27 June 1984 from the relevant Senior Assistant Director of Inland Revenue requiring the plaintiffs' solicitors to arrange to effect payment of the amount to the Income Tax Department.

The payment was not made. Instead the plaintiffs caused this originating summons to issue seeking on two different grounds a declaration that the amount paid is not liable for the deductions prescribed by s. 107A of the Income Tax Act 1967.

The defendants having entered an appearence to the Originating Summons have moved the Court by Summons-in-Chambers (encl. (5) which is the matter now before me to have the Originating Summons struck off firstly on the contention that it discloses no cause of action, is frivolous and vexatious and an abuse of process and secondly on the contention that in any event the plaintiffs' remedy is by way of appeal to the Special Commissioners of Income Tax which avenue they have to exhaust before moving the High Court.

Now, it must be borne in mind that it is only in plain and obvious cases that recourse should be made to the summary process invoked by the defendants: *Hubbuck & Sons v. Wilkinson, Heywood & Clark* [1899] 1 QB 86 per Lindley MR at 91. Also see *Attorney-General of Duchy of Lancaster v. London & N.W. Railway Co.* [1892] 3 Ch 274.

While until 1883, the Common Law Courts had no jurisdiction to make declaratory judgments, in the Court of Chancery binding declarations of rights were always made but only if some right to relief was shown and established. This was changed in England by O. 25 r. 5 of the

1883 Rules of Supreme Court which empowered the Court to make binding declaration of right whether or not any consequential relief is or could be claimed. See *The Supreme Court Practice* (1979) Vol. 1 15/16/1. Order 15 r. 16 is the equipollent provision in our Rules of the High Court.

Also to be borne in mind is that the power to make a binding declaration of right is discretionary remedy: *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438. *Inter alia* the Court will not generally decide academical or hypothetical questions: *Re Barnato* [1949] Ch 258 or where the plaintiff's claim is too indirect or insubstantial and would not give him relief in any real sense i.e. relieve him from any liability or disadvantage or difficulty: *Thorne Rural District Council v. Bunting* [1972] Ch 470.

In the face of the opinion expressed for and on behalf of the Government in respect of the "mandatory" need to make the deductions it seems to me there is no question but that the plaintiffs have a substantial cause of action that involves issues which are far from being hypothetical or academical and which is of direct interest to the plaintiffs and involves the substantial sum of some RM200,000. The pursuit of that cause cannot be any stretch be described as frivolous or vexatious or an abuse of the process of Court.

The second ground of complaint by the defendants calls for a perusal of the Income Tax Act with particular reference to Part VI which deals with assessments and appeals and to the sections in Part VII leading up to s. 107A.

The Special Commissioners of Income Tax are appointed pursuant to s. 98 of the Income Tax Act, 1967. Their powers and duties are specific and are as set out in Chapter 2 of Part VI of the Act which has to be read with Schedule 5 to the Act. Their powers and pursuant to which their duties are clearly limited to appeals against assessments of income tax made by the Director General of Inland Revenue pursuant to the Income Tax Act. It is "a person aggrieved by an assessment made in respect of him" who may appeal to the Special Commissioners (s. 99 (1)). Apart from hearing and disposing of appeals against an assessment that had been duly made by the Director General the only other duties that the Special Commissioners have are: (1) to decide, on application, whether to extend the time for appealing where the appeal had not been preferred within the prescribed time (s. 100 (4)), and (2) to decide, on application, whether to set aside any agreement purported to have been arrived at between the Director General and an appellant on a review of the assessment by the Director General after an appeal had been preferred (s. 101 (5)).

Now, an assessment against which an appeal may be preferred to the Special Commissioners is an assessment duly made by the Director General pursuant to Chapter 1 of Part VI of the Act. By s. 93 it is mandatory that the assessment shall be in the appropriate prescribed form; and shall indicate, in addition to any other material included therein, the appropriate year of assessment and the amount or additional amount of chargeable income and the tax charged thereon or the amount of tax or additional tax, as the case may be; and shall specify in the appropriate space in that form the date on which that form was duly completed.

For the Government it was argued that in the instant case what had happened (in the light of s. 107A of the Income Tax Act) tantamounted to there having been an advance assessment from which an appeal lies to the Special Commissioners. It must be recollected that what had happened was that after the Government had effected the payment to the plaintiffs' solicitors of the amount at which the plaintiffs' claim had been settled, a request was made for repayment of 20% thereof that the Government says should have been deducted by it before the payment was made.

I fail to see how that could amount to an advance assessment. The provision in the Act for advance assessments is s. 92 which deals with the circumstances in which the Director General may make what is known as an advance assessment. And an advance assessment has to be made in the manner prescribed by s. 93. Section 107A has no reference to any of the circumstance dealt with by Section 92. Section 107A is within Part VII of the Act which deals with Collection and Recovery of Tax. Section 107A provides a method of collection of tax which may or may not have been assessed. The Special Commissioners do not have jurisdiction to entertain any appeal or complaint in respect of matters or questions that arise from or in respect of the collection and recovery of tax.

In my judgment the relief sought by the plaintiffs by the Originating Summons is properly before this Court. The application, encl. (5), is dismissed with costs.

Also found at [1985] 1 CLJ 178